

STATE OF WASHINGTON
GRANT COUNTY SUPERIOR COURT

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

City of Moses Lake,

Defendant.

NO.

CONSENT DECREE

Table of Contents

	<u>Page</u>
I. INTRODUCTION.....	2
II. JURISDICTION.....	3
III. PARTIES BOUND	4
IV. DEFINITIONS.....	4
V. STATEMENT OF FACTS.....	5
VI. WORK TO BE PERFORMED	8
VII. DESIGNATED PROJECT COORDINATORS	9
VIII. PERFORMANCE	10
IX. ACCESS	10
X. SAMPLING, DATA REPORTING, AND AVAILABILITY.....	11
XI. PROGRESS REPORTS	11
XII. RETENTION OF RECORDS	12
XIII. TRANSFER OF INTEREST IN PROPERTY	12
XIV. RESOLUTION OF DISPUTES	13
XV. AMENDMENT OF CONSENT DECREE	14
XVI. EXTENSION OF SCHEDULE.....	15
XVII. ENDANGERMENT	16
XVIII. COVENANT NOT TO SUE.....	17
XIX. CONTRIBUTION PROTECTION	18
XX. LAND USE RESTRICTIONS	18

XXI.	FINANCIAL ASSURANCES	19
XXII.	INDEMNIFICATION.....	20
XXIII.	COMPLIANCE WITH APPLICABLE LAWS	20
XXIV.	REMEDIAL AND INVESTIGATIVE COSTS	21
XXV.	IMPLEMENTATION OF REMEDIAL ACTION	22
XXVI.	FIVE YEAR REVIEW.....	22
XXVII.	PUBLIC PARTICIPATION.....	22
XXVIII.	DURATION OF DECREE	23
XXIX.	CLAIMS AGAINST THE STATE	24
XXX.	EFFECTIVE DATE	24
XXXI.	PUBLIC NOTICE AND WITHDRAWAL OF CONSENT.....	24

Exhibit A - Site Diagram
Exhibit B - Cleanup Action Plan
Exhibit C - Scope of Work and Schedule
Exhibit D - Restrictive Covenant
Exhibit E - Public Participation Plan

I. INTRODUCTION

A. In entering into this Consent Decree (Decree), the mutual objective of the Washington State Department of Ecology (Ecology) and the City of Moses Lake (Defendant) is to provide for remedial action at a facility where there has been a release or threatened release of hazardous substances. This Decree requires Defendant to undertake the following remedial action(s):

- (1) Excavation of soils contaminated with soil indicator analytes at concentrations exceeding cleanup levels.
- (2) Transport of contaminated soils to an approved permitted landfill.
- (3) Backfill with clean soils to grade.
- (4) Quarterly monitoring of groundwater of wells in the East Portion of the Site for a minimum of one year.
- (5) Institutional controls in the form of restrictive covenants, fences, signs, and the maintenance of these controls.

Ecology has determined that these actions are necessary to protect human health and the environment.

1 B. The Complaint in this action is being filed simultaneously with this Decree. An
2 Answer has not been filed, and there has not been a trial on any issue of fact or law in this case.
3 However, the Parties wish to resolve the issues raised by Ecology's Complaint. In addition, the
4 Parties agree that settlement of these matters without litigation is reasonable and in the public
5 interest, and that entry of this Decree is the most appropriate means of resolving these matters.

6 C. In signing this Decree, the Parties agree to its entry and agree to be bound by its
7 terms.

8 D. By entering into this Decree, the Parties do not intend to discharge non-settling
9 Parties from any liability they may have with respect to matters alleged in the Complaint. The
10 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
11 sums expended under this Decree.

12 E. This Decree shall not be construed as proof of liability or responsibility for any
13 releases of hazardous substances or cost for remedial action nor an admission of any facts;
14 provided, however, that the Defendant shall not challenge the authority of the Attorney General
15 and Ecology to enforce this Decree.

16 F. The Court is fully advised of the reasons for entry of this Decree, and good cause
17 having been shown:

18 Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

19 II. JURISDICTION

20 A. This Court has jurisdiction over the subject matter and over the Parties pursuant
21 to Chapter 70.105D RCW, the Model Toxics Control Act (MTCA).

22 B. Authority is conferred upon the Washington State Attorney General by RCW
23 70.105D.040(4)(a) to agree to a settlement with any potentially liable person if, after public
24 notice and any required hearing, Ecology finds the proposed settlement would lead to a more
25 expeditious cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that such a
26 settlement be entered as a Consent Decree issued by a court of competent jurisdiction.

1 C. Ecology has determined that a release or threatened release of hazardous
2 substances has occurred at the Site that is the subject of this Decree.

3 D. Ecology has given notice to Defendant of Ecology's determination that Defendant
4 is a potentially liable person for the Site, as required by RCW 70.105D.020(16) and WAC
5 173-340-500.

6 E. The actions to be taken pursuant to this Decree are necessary to protect public
7 health and the environment.

8 F. This Decree has been subject to public notice and comment.

9 G. Ecology finds that this Decree will lead to a more expeditious cleanup of
10 hazardous substances at the Site in compliance with the cleanup standards established under
11 RCW 70.105D.030(2)(e) and Chapter 173-340 WAC.

12 H. Defendant has agreed to undertake the actions specified in this Decree and
13 consents to the entry of this Decree under MTCA.

14 III. PARTIES BOUND

15 This Decree shall apply to and be binding upon the Parties to this Decree, their
16 successors and assigns. The undersigned representative of each party hereby certifies that he or
17 she is fully authorized to enter into this Decree and to execute and legally bind such party to
18 comply with the Decree. Defendant agrees to undertake all actions required by the terms and
19 conditions of this Decree. No change in ownership or corporate status shall alter Defendant's
20 responsibility under this Decree. Defendant shall provide a copy of this Decree to all agents,
21 contractors, and subcontractors retained to perform work required by this Decree, and shall
22 ensure that all work undertaken by such agents, contractors, and subcontractors complies with
23 this Decree.

24 IV. DEFINITIONS

25 Except as specified herein, all definitions in RCW 70.105D.020 and WAC 173-340-200
26 apply to the terms in this Decree.

1 A. Site: The Site, referred to as the Moses Lake City Maintenance Facility Site, and
2 is generally located at 835 East Penn Street, Moses Lake, in Grant County, Washington. The
3 Site is more particularly described in Exhibit A to this Decree, which is a detailed Site diagram.
4 The Site constitutes a Facility under RCW 70.105D.020(4).

5 B. Parties: Refers to the Washington State Department of Ecology and the City of
6 Moses Lake.

7 C. Defendant: Refers to the City of Moses Lake.

8 D. Consent Decree or Decree: Refers to this Consent Decree and each of the
9 exhibits to the Decree. All exhibits are integral and enforceable parts of this Consent Decree.
10 The terms "Consent Decree" or "Decree" shall include all exhibits to the Consent Decree.

11 V. STATEMENT OF FACTS

12 Ecology makes the following findings of fact without any express or implied admissions
13 by Defendant.

14 (1) The Site is located on East Penn Street in Moses Lake, Washington.

15 (2) The City of Moses Lake (the City) is the owner and operator of the property at 835
16 East Penn Street, Moses Lake, Washington (the Property). The Property covers a four
17 acre area at the intersection of Block Street and Wheeler Road (Exhibit A). The City
18 used the Property to store, maintain, and fuel city vehicles from the 1950s through the
19 present.

20 (3) One 500-gallon diesel underground storage tank (UST), one 1000-gallon diesel UST,
21 one 6000-gallon regular gasoline UST, one 8000-gallon unleaded gasoline UST, one
22 500-gallon used oil UST, and one unknown capacity (less than 6000 gallon) regular
23 gasoline UST were all located on the Property.

24 (4) Evidence of a compromised tank was noted in the 1970s when the unknown capacity
25 regular gasoline UST was removed. Remedial action and cleanup is reported to have
26 occurred but no written records have been found. Petroleum contaminated soil was

1 noted in 1986 when the 500-gallon diesel UST was replaced with the 1000-gallon
2 diesel UST. Remedial action is reported to have occurred at the location of the 500-
3 gallon tank also. In 1990, at the request of the Department of Ecology, a soil sample
4 was collected from a test pit at the location of the old 500-gallon diesel UST. Results
5 confirmed the presence of petroleum contaminated soil.

6 (5) In certified correspondence dated November 7, 1991, Ecology notified the City of the
7 preliminary finding of potential liability and requested comment on that finding.

8 (6) In certified correspondence dated January 3, 1992, Ecology notified the City of their
9 status as potentially liable persons with regard to the release of hazardous substances at
10 the City of Moses Lake Maintenance Facility.

11 (7) In March 1992, the City completed a Remedial Investigation (RI) to assess the nature,
12 concentration, and source of the petroleum discovered during the removal of the 500-
13 gallon diesel UST. The RI concluded that the petroleum contaminated soil was a result
14 of leaks from the diesel UST and spills related to fueling and maintenance of vehicles.
15 Groundwater was not determined to be affected. An unknown amount of contaminated
16 soil was removed.

17 (8) In November 1992, the four remaining USTs (6,000-gallon regular gasoline, 8,000-
18 gallon unleaded gasoline, 1,000-gallon diesel, and 500-gallon waste oil) were
19 decommissioned and removed by the City. During the removal, petroleum
20 contaminated soil was discovered in the excavations. Consequently, the City
21 conducted further assessment of the contamination. Test pit and excavation pit soil
22 samples showed concentrations of aged gasoline, diesel, and lead exceeding cleanup
23 levels. Groundwater sampling from the excavations and two on-site monitoring wells
24 showed aged gasoline and lead concentrations exceeding cleanup levels.

25 (9) In February 1993, Ecology performed a site hazard assessment. The Site was evaluated
26 through the Washington Ranking Method (WARM) and ranked a 4. In July of 1994,

1 the ranking was revised to a 2 to better account for the risk from contaminated
2 groundwater.

3 (10) In January 1994, a consultant to the City performed an RI/FS independent of
4 Ecology for areas of the Site known to be contaminated but not yet cleaned up. Two
5 areas of soil contamination, one by diesel and one by gasoline, were discovered, and a
6 plume of gasoline contamination was detected in groundwater. As a result, in early
7 1995 the City installed an air sparge and vapor extraction system to remediate
8 contaminated groundwater. Thereafter, the City determined that the contaminants had
9 been lowered to below action levels and the system was turned off in April 1997. No
10 excavation of soil took place.

11 (11) In June 1995, during excavation for a sweeper pit, petroleum contaminated soil
12 and waste oil filters were discovered. The contaminated soil and waste materials were
13 excavated.

14 (12) In late 2001, the City purchased adjoining property to the west to build a new
15 shop. During test pit investigations, petroleum contaminated soil was discovered, and
16 although groundwater was not tested, it is assumed to be impacted.

17 (13) In November 2002, Ecology and the City entered into Agreed Order No. 02-
18 TCPER-4684 to complete an RI/FS on the original and the newly-purchased
19 maintenance facility properties to determine the nature and extent of contamination at
20 the Site and to evaluate remedial alternatives for the Site.

21 (14) Under the Agreed Order, the City submitted the City of Moses Lake
22 Maintenance Facility Remedial Investigation/Feasibility Study (December 2003). The
23 RI/FS presents the results of soil and groundwater sampling. Ecology approved the
24 RI/FS on January 23, 2004.
25
26

1 (15) Thereafter, Ecology prepared a Cleanup Action Plan for the Site that determined
2 the contaminants of concern, selected the cleanup alternative, and outlined the remedial
3 actions to be taken.

4 VI. WORK TO BE PERFORMED

5 This Decree contains a program designed to protect human health and the environment
6 from the known release, or threatened release, of hazardous substances or contaminants at, on,
7 or from the Site.

8 (1) Defendant shall implement the Cleanup Action Plan (Exhibit B).

9 (2) Defendant shall perform all tasks and submit to Ecology all deliverables set forth in the
10 Scope of Work and Schedule (Exhibit C) in the manner and within the timeframes
11 provided for therein. The Scope of Work and Schedule (Exhibit C) will serve as a
12 detailed description of the work elements outlined in the Cleanup Action Plan.

13 (3) The Remedial Action Plan is described in Exhibit C and is subject to review and
14 approval by Ecology before the Defendant performs work under that plan. The
15 Remedial Action Plan will include a general description and schedule of work to be
16 performed. The Defendant shall incorporate Ecology's comments on the drafts into the
17 final version of the document. Upon approval, the Remedial Action Plan, including the
18 schedule of work, shall become an integral and enforceable part of this Decree, and
19 shall be complied with by the Defendant.

20 (4) Within ten (10) days of entry of this Decree, Defendants shall record with the Grant
21 County Auditor's Office the Restrictive Covenant attached to this Decree as Exhibit D
22 and provide Ecology with proof of such recording.

23 (5) Defendant agrees not to perform any remedial actions outside the scope of this Decree
24 unless the Parties agree to modify the Scope of Work to cover these actions. All work
25 conducted by Defendants under this Decree shall be done in accordance with
26 Chapter 173-340 WAC unless otherwise provided herein.

1
2 **VII. DESIGNATED PROJECT COORDINATORS**

3 The project coordinator for Ecology is:

4 Sandra Treccani
5 Department of Ecology
6 Eastern Regional Office
7 4601 N. Monroe
8 Spokane, WA 99205-1295

9 The project coordinator for Defendant is:

10 Gerry McFaul, City Engineer
11 Municipal Services Department
12 City of Moses Lake
13 321 S. Balsam St. P.O. Box 1579
14 Moses Lake, WA 98837

15 Each project coordinator shall be responsible for overseeing the implementation of this
16 Decree. The Ecology project coordinator will be Ecology's designated representative for the
17 Site. To the maximum extent possible, communications between Ecology and Defendant and all
18 documents, including reports, approvals, and other correspondence concerning the activities
19 performed pursuant to the terms and conditions of this Decree shall be directed through the
20 project coordinators. The project coordinators may designate, in writing, working level staff
21 contacts for all or portions of the implementation of the remedial work required by this Decree.
22 The project coordinators may agree to minor changes to the work to be performed without
23 formal amendments to this Decree. Minor changes will be documented in writing by Ecology.
24 Substantial changes shall require amendment of this Consent Decree.

25 Any Party may change its respective project coordinator. Written notification shall be
26 given to the other Parties at least ten (10) calendar days prior to the change.

1 **VIII. PERFORMANCE**

2 All work performed pursuant to this Decree shall be under the direction and supervision,
3 as necessary, of a licensed professional engineer or licensed hydrogeologist, or equivalent, with
4 experience and expertise in hazardous waste site investigation and cleanup. Defendant shall
5 notify Ecology in writing of the identity of such engineer(s) or hydrogeologist(s), or others, and
6 of any contractors and subcontractors to be used in carrying out the terms of this Decree, in
7 advance of their involvement at the Site.

8 Any construction work performed pursuant to this Decree shall be under the
9 supervision of a professional engineer or a qualified technician under the direct supervision of
10 a professional engineer. The professional engineer must be registered in the State of
11 Washington, except as provided in RCW 18.43.130.

12 **IX. ACCESS**

13 Ecology or any Ecology authorized representative shall have full authority to enter and
14 freely move about all property at the Site that Defendant either owns, controls, or has access
15 rights to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs,
16 and contracts related to the work being performed pursuant to this Decree; reviewing Defendant's
17 progress in carrying out the terms of this Decree; conducting such tests or collecting such
18 samples as Ecology may deem necessary; using a camera, sound recording, or other
19 documentary type equipment to record work done pursuant to this Decree; and verifying the data
20 submitted to Ecology by the Defendant. Defendant shall make all reasonable efforts to secure
21 access rights for those properties within the Site not owned or controlled by Defendant where
22 remedial activities or investigations will be performed pursuant to this Decree. Ecology or any
23 Ecology authorized representative shall give reasonable notice before entering any Site property
24 owned or controlled by Defendant unless an emergency prevents such notice. All Parties who
25 access the Site pursuant to this paragraph shall comply with the approved Health and Safety
26

1 Plans. Ecology employees and their representatives shall not be required to sign any liability
2 release or waiver as a condition of site property access.

3 **X. SAMPLING, DATA REPORTING, AND AVAILABILITY**

4 With respect to the implementation of this Decree, Defendant shall make the results of all
5 sampling, laboratory reports, and/or test results generated by it or on its behalf available to
6 Ecology and shall submit these results in accordance with Section XI of this Decree.

7 Ground water sampling data shall be submitted to Ecology according to the
8 requirements of WAC 173-340-840(5). These submittals shall be provided to Ecology in
9 accordance with Section XI of this Decree.

10 If requested by Ecology, Defendant shall allow split or duplicate samples to be taken by
11 Ecology and/or its authorized representative of any samples collected by Defendant pursuant to
12 the implementation of this Decree. Defendant shall notify Ecology seven (7) days in advance of
13 any sample collection or work activity at the Site. Ecology shall, upon request, allow split or
14 duplicate samples to be taken by Defendant or its authorized representative of any samples
15 collected by Ecology pursuant to the implementation of this Decree provided it does not interfere
16 with Ecology's sampling. Without limitation on Ecology's rights under Section IX, Ecology shall
17 notify Defendant prior to any sample collection activity unless an emergency prevents such
18 notice.

19 In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be
20 conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to
21 be conducted, unless otherwise approved by Ecology.

22 **XI. PROGRESS REPORTS**

23 Defendant shall submit to Ecology written monthly Progress Reports that describe the
24 actions taken during the previous month to implement the requirements of this Decree. The
25 Progress Reports shall include the following:

26 A. A list of on-site activities that have taken place during the month;

1 B. Detailed description of any deviations from required tasks not otherwise
2 documented in project plans or amendment requests;

3 C. Description of all deviations from the Schedule (Exhibit C) during the current
4 month and any planned deviations in the upcoming month;

5 D. For any deviations in schedule, a plan for recovering lost time and maintaining
6 compliance with the schedule;

7 E. All raw data (including laboratory analyses) received by Defendant during the
8 past month and an identification of the source of the sample; and

9 F. A list of deliverables for the upcoming month if different from the Schedule.

10 All Progress Reports shall be submitted by the tenth (10) day of the month in which they
11 are due after the effective date of this Decree. Unless otherwise specified, Progress Reports and
12 any other documents submitted pursuant to this Decree shall be sent by certified mail, return
13 receipt requested, to Ecology's project coordinator.

14 XII. RETENTION OF RECORDS

15 During the pendency of this Decree and for ten (10) years from the date this Decree is no
16 longer in effect as provided in Section XXVIII, the Defendant shall preserve all records, reports,
17 documents, and underlying data in its possession relevant to the implementation of this Decree
18 and shall insert a similar record retention requirement into all contracts with project contractors
19 and subcontractors. Upon request of Ecology, Defendant shall make all records available to
20 Ecology and allow access for review within a reasonable time.

21 XIII. TRANSFER OF INTEREST IN PROPERTY

22 No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest
23 in any portion of the Site shall be consummated by Defendant without provision for continued
24 operation and maintenance of any containment system, treatment system, and/or monitoring
25 system installed or implemented pursuant to this Decree.

1 Prior to Defendant's transfer of any interest in all or any portion of the Site, and during
2 the effective period of this Decree, Defendant shall serve a copy of this Decree upon any
3 prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least
4 thirty (30) days prior to any transfer, Defendant shall notify Ecology of said transfer. Upon
5 transfer of any interest, Defendant shall restrict uses and activities to those consistent with this
6 Consent Decree and notify all transferees of the restrictions on the use of the property.

7 **XIV. RESOLUTION OF DISPUTES**

8 A. In the event a dispute arises as to an approval, disapproval, proposed change, or
9 other decision or action by Ecology's project coordinator, the Parties shall utilize the dispute
10 resolution procedure set forth below.

11 (1) Upon receipt of the Ecology project coordinator's decision, Defendant has
12 fourteen (14) days within which to notify Ecology's project coordinator of its objection to the
13 decision.

14 (2) The Parties' project coordinators shall then confer in an effort to resolve the
15 dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days,
16 Ecology's project coordinator shall issue a written decision.

17 (3) Defendant may then request regional management review of the decision. This
18 request shall be submitted in writing to the Eastern Region Toxics Cleanup Program Section
19 Manager within seven (7) days of receipt of Ecology's project coordinator's decision.

20 (4) Ecology's Regional Section Manager shall conduct a review of the dispute and
21 shall issue a written decision regarding the dispute within thirty (30) days of the Defendant's
22 request for review.

23 (5) If the Defendant finds Ecology's Regional Section Manager's decision
24 unacceptable, Defendant may then request final management review of the decision. This
25 request shall be submitted in writing to the Toxics Cleanup Program Manager within seven (7)
26 days of receipt of the Regional Section Manager's decision.

1 (6) Ecology's Program Manager shall conduct a review of the dispute and shall issue
2 a written decision regarding the dispute within thirty (30) days of the Defendant's request for
3 review. The Program Manager's decision shall be Ecology's final decision on the disputed matter.

4 B. If Ecology's final written decision is unacceptable to Defendant, Defendant has
5 the right to submit the dispute to the Court for resolution. The Parties agree that one judge
6 should retain jurisdiction over this case and shall, as necessary, resolve any dispute arising under
7 this Decree. In the event Defendant presents an issue to the Court for review, the Court shall
8 review the action or decision of Ecology on the basis of whether such action or decision was
9 arbitrary and capricious and render a decision based on such standard of review.

10 C. The Parties agree to only utilize the dispute resolution process in good faith and
11 agree to expedite, to the extent possible, the dispute resolution process whenever it is used.
12 Where either Party utilizes the dispute resolution process in bad faith or for purposes of delay,
13 the other Party may seek sanctions.

14 D. Implementation of these dispute resolution procedures shall not provide a basis
15 for delay of any activities required in this Decree, unless Ecology agrees in writing to a schedule
16 extension or the Court so orders.

17 **XV. AMENDMENT OF CONSENT DECREE**

18 This Decree may only be amended by a written stipulation among the Parties that is
19 entered by the Court, or by order of the Court. Such amendment shall become effective upon
20 entry by the Court. Agreement to amend the Decree shall not be unreasonably withheld by any
21 Party.

22 Defendant shall submit any request for an amendment to Ecology for approval. Ecology
23 shall indicate its approval or disapproval in a timely manner after the request for amendment is
24 received. If the amendment to the Decree represents a substantial change, Ecology will provide
25 public notice and opportunity for comment. Reasons for the disapproval of a proposed
26 amendment to the Decree shall be stated in writing. If Ecology does not agree to any proposed

1 amendment, the disagreement may be addressed through the dispute resolution procedures
2 described in Section XIV of this Decree.

3 **XVI. EXTENSION OF SCHEDULE**

4 A. An extension of schedule shall be granted only when a request for an extension is
5 submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the
6 deadline for which the extension is requested, and good cause exists for granting the extension.

7 All extensions shall be requested in writing. The request shall specify

8 (1) The deadline that is sought to be extended;

9 (2) The length of the extension sought;

10 (3) The reason(s) for the extension; and

11 (4) Any related deadline or schedule that would be affected if the extension were
12 granted.

13 B. The burden shall be on Defendant to demonstrate to the satisfaction of Ecology
14 that the request for such extension has been submitted in a timely fashion and that good cause
15 exists for granting the extension. Good cause includes, but is not limited to:

16 (1) Circumstances beyond the reasonable control and despite the due diligence of
17 Defendant including delays caused by unrelated third parties or Ecology, such as (but not limited
18 to) delays by Ecology in reviewing, approving, or modifying documents submitted by
19 Defendant; or

20 (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other
21 unavoidable casualty; or

22 (3) Endangerment as described in Section XVII.

23 However, neither increased costs of performance of the terms of the Decree nor changed
24 economic circumstances shall be considered circumstances beyond the reasonable control of
25 Defendant.

1 C. Ecology shall act upon any written request for extension in a timely fashion.
2 Ecology shall give Defendant written notification in a timely fashion of any extensions granted
3 pursuant to this Decree. A requested extension shall not be effective until approved by
4 Ecology or, if required, by the Court. Unless the extension is a substantial change, it shall not
5 be necessary to amend this Decree pursuant to Section XV when a schedule extension is
6 granted.

7 D. An extension shall only be granted for such period as Ecology determines is
8 reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety
9 (90) days only as a result of:

- 10 (1) Delays in the issuance of a necessary permit which was applied for in a timely
11 manner; or
12 (2) Other circumstances deemed exceptional or extraordinary by Ecology; or
13 (3) Endangerment as described in Section XVII.

14 **XVII. ENDANGERMENT**

15 If, for any reason, Ecology determines that any activity being performed at the Site is
16 creating or has the potential to create a danger to human health or the environment, Ecology may
17 direct Defendant to cease such activities for such period of time as it deems necessary to abate
18 the danger. Defendant shall immediately comply with such direction.

19 If, for any reason, Defendant determines that any activity being performed at the Site is
20 creating or has the potential to create a danger to human health or the environment, Defendant
21 may cease such activities. Defendant shall notify Ecology's project coordinator as soon as
22 possible, but no later than twenty-four (24) hours after making such determination or ceasing
23 such activities. Upon Ecology's direction, Defendant shall provide Ecology with documentation
24 of the basis for the determination or cessation of such activities. If Ecology disagrees with
25 Defendant's cessation of activities, it may direct Defendant to resume such activities.
26

1 If Ecology concurs with or orders a work stoppage pursuant to this section, Defendant's
2 obligations with respect to the ceased activities shall be suspended until Ecology determines the
3 danger is abated, and the time for performance of such activities, as well as the time for any other
4 work dependent upon such activities, shall be extended, in accordance with Section XVI, for
5 such period of time as Ecology determines is reasonable under the circumstances.

6 Nothing in this Order shall limit the authority of Ecology, its employees, agents, or
7 contractors to take or require appropriate action in the event of an emergency.

8 XVIII. COVENANT NOT TO SUE

9 A. Covenant Not to Sue: In consideration of Defendant's compliance with the terms
10 and conditions of this Decree, Ecology covenants not to institute legal or administrative actions
11 against Defendant regarding the release or threatened release of hazardous substances covered by
12 this Decree.

13 This Decree covers only the Site specifically identified in Exhibit A and those hazardous
14 substances that Ecology knows are located at the Site as of the date of entry of this Decree. This
15 Decree does not cover any other hazardous substance or area. Ecology retains all of its authority
16 relative to any substance or area not covered by this Decree.

17 This Covenant Not to Sue shall have no applicability whatsoever to:

- 18 (1) Criminal liability;
19 (2) Liability for damages to natural resources;
20 (3) Any Ecology action, including cost recovery, against potentially liable persons
21 not a party to this Decree.

22 If factors not known to Ecology at the time of entry of the settlement agreement are
23 discovered and present a previously unknown threat to human health or the environment, the
24 Court shall amend this covenant not to sue.

25 B. Reopeners: Ecology specifically reserves the right to institute legal or
26 administrative action against Defendant to require it to perform additional remedial actions at the

1 Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050 under the following
2 circumstances:

3 (1) Upon Defendant's failure to meet the requirements of this Decree, including, but
4 not limited to, failure of the remedial action to meet the cleanup standards identified in the CAP
5 (Exhibit B);

6 (2) Upon Ecology's determination that remedial action beyond the terms of this
7 Decree is necessary to abate an imminent and substantial endangerment to human health or the
8 environment;

9 (3) Upon the availability of new information regarding factors previously unknown
10 to Ecology, including the nature or quantity of hazardous substances at the Site, and Ecology's
11 determination, in light of this information, that further remedial action is necessary at the Site to
12 protect human health or the environment; or

13 (4) Upon Ecology's determination that additional remedial actions are necessary to
14 achieve cleanup standards within the reasonable restoration time frame set forth in the CAP.

15 C. Except in the case of an emergency, prior to instituting legal or administrative
16 action against the Defendant pursuant to paragraph B. above, Ecology shall provide the
17 Defendant with fifteen (15) calendar days notice of such action.

18 **XIX. CONTRIBUTION PROTECTION**

19 With regard to claims for contribution against Defendant, the Parties agree that
20 Defendant is entitled to protection against claims for contribution for matters addressed in this
21 Decree as provided by RCW 70.105D.040(4)(d).

22 **XX. LAND USE RESTRICTIONS**

23 Because institutional controls are required at the Site pursuant to WAC 173-340-440(4),
24 Defendant agrees that a Restrictive Covenant (Exhibit D) shall be recorded with the office of the
25 Grant County Auditor within ten (10) days of the effective date of this Decree. The Restrictive
26

1 Covenant shall restrict future uses of the Site. Defendant will provide Ecology with a copy of the
2 recorded Restrictive Covenant within thirty (30) days of the recording date.

3 **XXI. FINANCIAL ASSURANCES**

4 Pursuant to WAC 173-340-440(11), Defendant shall maintain sufficient and adequate
5 financial assurance mechanisms to cover all costs associated with the operation and maintenance
6 of the remedial action at the Site, including institutional controls, compliance monitoring, and
7 corrective measures.

8 Within sixty (60) days of the effective date of this Decree, Defendant shall submit to
9 Ecology for review and approval an estimate of the costs that it will incur in carrying out the
10 terms of this Decree, including operation and maintenance and compliance monitoring. Within
11 sixty (60) days after Ecology approves the aforementioned cost estimate, the Defendant shall
12 provide proof of financial assurances sufficient to cover all such costs in a form acceptable to
13 Ecology.

14 Defendant shall adjust the financial assurance coverage and provide Ecology's project
15 manager with documentation of the updated financial assurance for:

16 1. Inflation, annually, within thirty (30) days of the anniversary date of the entry of
17 this Decree; or if applicable, the modified anniversary date established in accordance with the
18 following subparagraph, or if applicable, ninety (90) days after the close of the Defendant's fiscal
19 year if the financial test or corporate guarantee is used, and

20 2. Changes in cost estimates, within thirty (30) days of issuance of Ecology's
21 approval of a modification or revision to the CAP that results in increases to the cost or expected
22 duration of remedial actions. Any adjustments for inflation since the most recent preceding
23 anniversary date shall be made concurrent with adjustments for changes in cost estimates. The
24 issuance of Ecology's approval of a revised or modified CAP will revise the anniversary date
25 established in subparagraph (1) above to become the date of issuance of such revised or modified
26 CAP.

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Defendant agrees to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of Defendant, its officers, employees, agents, or contractors in entering into and implementing this Decree. However, the Defendant shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in implementing the activities pursuant to this Decree.

XXIII. COMPLIANCE WITH APPLICABLE LAWS

A. All actions carried out by Defendant pursuant to this Decree shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in RCW 70.105D.090.

B. Pursuant to RCW 70.105D.090(1), the substantive requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals for the remedial action under this Decree that are known to be applicable at the time of entry of the Decree have been included in Exhibit B, the CAP, and are binding and enforceable requirements of the Decree.

Defendant has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Decree. In the event either Defendant or Ecology determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Decree, it shall promptly notify the other party of this determination. Ecology shall determine whether Ecology or Defendant shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, Defendant shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation

1 from those agencies of the substantive requirements those agencies believe are applicable to the
2 remedial action. Ecology shall make the final determination on the additional substantive
3 requirements that must be met by Defendant and on how Defendant must meet those
4 requirements. Ecology shall inform Defendant in writing of these requirements. Once
5 established by Ecology, the additional requirements shall be enforceable requirements of this
6 Decree. Defendant shall not begin or continue the remedial action potentially subject to the
7 additional requirements until Ecology makes its final determination.

8 Ecology shall ensure that notice and opportunity for comment is provided to the public
9 and appropriate agencies prior to establishing the substantive requirements under this section.

10 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
11 exemption from complying with the procedural requirements of the laws referenced in RCW
12 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for
13 the state to administer any federal law, the exemption shall not apply and the Defendant shall
14 comply with both the procedural and substantive requirements of the laws referenced in RCW
15 70.105D.090(1), including any requirements to obtain permits.

16 **XXIV. REMEDIAL AND INVESTIGATIVE COSTS**

17 The Defendant agrees to pay costs incurred by Ecology pursuant to this Decree and
18 consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or
19 its contractors for, or on, the Site under Chapter 70.105D RCW, including remedial actions and
20 Decree preparation, negotiations, oversight and administration. These costs shall include work
21 performed both prior to and subsequent to the entry of this Decree. Ecology costs shall include
22 costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2).
23 Defendant agrees to pay the required amount within ninety (90) days of receiving from Ecology
24 an itemized statement of costs that includes a summary of costs incurred, an identification of
25 involved staff, and the amount of time spent by involved staff members on the project. A general
26 statement of work performed will be provided upon request. Itemized statements shall be

1 prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay Ecology's costs within
2 ninety (90) days of receipt of the itemized statement will result in interest charges at the rate of
3 twelve percent (12%) per annum, compounded monthly.

4 **XXV. IMPLEMENTATION OF REMEDIAL ACTION**

5 If Ecology determines that Defendant has failed without good cause to implement the
6 remedial action, in whole or in part, Ecology may, after notice to Defendant, perform any or all
7 portions of the remedial action that remain incomplete. If Ecology performs all or portions of the
8 remedial action because of the Defendant's failure to comply with its obligations under this
9 Decree, Defendant shall reimburse Ecology for the costs of doing such work in accordance with
10 Section XXIV of this Decree, provided that Defendant is not obligated under this section to
11 reimburse Ecology for costs incurred for work inconsistent with or beyond the scope of this
12 Decree.

13 **XXVI. PERIODIC REVIEW**

14 As remedial action, including ground water monitoring, continues at the Site, the Parties
15 agree to review the progress of remedial action at the Site, and to review the data accumulated as
16 a result of monitoring the Site as often as is necessary and appropriate under the circumstances.
17 At least every five years after the initiation of cleanup action at the Site, the Parties shall meet to
18 discuss the status of the Site and the need, if any, for further remedial action at the Site. Ecology
19 reserves the right to require further remedial action at the Site under appropriate circumstances.
20 This provision shall remain in effect for the duration of the Decree.

21 **XXVII. PUBLIC PARTICIPATION**

22 Ecology shall maintain the responsibility for public participation at the Site. However,
23 Defendant shall cooperate with Ecology, and shall:

24 A. If agreed to by Ecology, prepare drafts of public notices and fact sheets at
25 important stages of the remedial action, such as the submission of work plans, remedial
26 investigation/feasibility study reports, cleanup action plans, and engineering design reports. As

1 appropriate, Ecology will edit, finalize, and distribute such fact sheets and prepare and distribute
2 public notices of Ecology's presentations and meetings;

3 B. Notify Ecology's project coordinator prior to the preparation of all press releases
4 and fact sheets, and before major meetings with the interested public and local governments.
5 Likewise, Ecology shall notify Defendant prior to the issuance of all press releases and fact
6 sheets, and before major meetings with the interested public and local governments. For all press
7 releases, fact sheets, meetings, and other outreach efforts by Defendant that do not receive prior
8 Ecology approval, Defendant shall clearly indicate to its audience that the press release, fact
9 sheet, meeting, or other outreach effort was not sponsored or endorsed by Ecology;

10 C. Participate in public presentations on the progress of the remedial action at the
11 Site. Participation may be through attendance at public meetings to assist in answering
12 questions, or as a presenter;

13 D. In cooperation with Ecology, arrange and/or continue information repositories at
14 the following locations:

- 15 (1) Big Bend Community College, 7662 Chanute Street NE, Moses Lake, WA; and
16 (2) Ecology's Eastern Regional Office at 4601 N Monroe, Spokane, WA.

17 At a minimum, copies of all public notices, fact sheets, and press releases; all quality
18 assured monitoring data; remedial actions plans and reports, supplemental remedial planning
19 documents, and all other similar documents relating to performance of the remedial action
20 required by this Decree shall be promptly placed in these repositories.

21 **XXVIII. DURATION OF DECREE**

22 The remedial program required pursuant to the Decree shall be maintained and continued
23 until Defendant has received written notification from Ecology that the requirements of this
24 Decree have been satisfactorily completed. This Decree shall remain in effect until dismissed by
25 this Court. When dismissed, Section XVIII, Covenant Not to Sue, and Section XIX,
26 Contribution Protection, shall survive.

1 **XXIX. CLAIMS AGAINST THE STATE**

2 Defendant hereby agrees that it will not seek to recover any costs accrued in
3 implementing the remedial action required by this Decree from the State of Washington or any
4 of its agencies. This Section does not restrict or prohibit Defendant from applying for grant
5 funding from the Local Toxics Control Account for a portion of the costs incurred in
6 implementing this Decree. Except as provided above, however, Defendant expressly reserves its
7 right to seek to recover any costs incurred in implementing this Decree from any other
8 potentially liable person.

9 **XXX. EFFECTIVE DATE**

10 This Decree is effective upon the date it is entered by the Court.

11 **XXXI. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

12 This Decree has been the subject of public notice and comment under RCW
13 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a
14 more expeditious cleanup of hazardous substances at the Site in compliance with the cleanup
15 standards established under Chapter 173-340 WAC.

16 If the Court withholds or withdraws its consent to this Decree, it shall be null and void at
17 the option of any party and the accompanying Complaint shall be dismissed without costs and
18 without prejudice. In such an event, no party shall be bound by the requirements of this Decree.

19
20 STATE OF WASHINGTON
21 DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

22 _____
23 James Pendowski
24 Program Manager
Toxics Cleanup Program

JOSEPH E. SHORIN III, WSBA 19705
Assistant Attorney General

25 Date: _____

Date: _____

1 CITY OF MOSES LAKE

2 
3 Joseph K. Gavinski
City Manager

4 Date: 8-26-04

5
6 ENTERED this _____ day of _____ 20____.

7
8 _____
9 JUDGE
Grant County Superior Court